Supreme Court, U.S.
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NO._____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

JOHN E. NAGLE, ET AL., Petitioner,

v.

HENRY C. BAILEY, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BILL PRYOR
Attorney General

and

STEPHEN N. DODD*
Assistant Attorney General

ATTORNEYS FOR PETITIONER

ADDRESS OF COUNSEL:
Office of Attorney General
Criminal Appeals Division
11 South Union Street
Montgomery, AL 36130
(334) 242-7300

* Counsel of Record

Whether recent amendments under the Anti-terrorism and Effective Death Penalty Act of 1996 ("AEDPA") place the power to confer jurisdiction for habeas corpus appeals through the issuance of certificates of appealability solely in circuit justices and judges pursant to 28 U.S.C 2253(c), at the same time allowing district courts to make recommendations relative to the disposition of habeas corpus appeals through the issuance of their own certificates of appealability pursuant to F.R.A.P. Rule 22(b)?

THE PARTIES

The parties are Henry C. Bailey, an Alabama state inmate who sought and was denied a writ of habeas corpus from the U.S. District Court for the Middle District of Alabama (herein "Respondent"), John E. Nagle, et al., Warden, Donaldson Correctional Facility, Bessemer, Alabama, and Jeff Sessions, Attorney General for the State of Alabama (herein "Petitioners").

This case was consolidated below with Hunter v. United States, 96-6513, for the purpose of en banc hearing in the Eleventh Circuit.

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OPINION AND ORDER BELOW

The Opinion of the Court of Appeals in Hunter v. United States, 101 F.3d 1565 (11th Cir. 1996), affirming the action of the District Court in granting a certificate of appealability to Respondent Henry C. Bailey, appears in the Appendix hereto. The Order of the United States District Court for the Middle District of Alabama, Northern Division, granting a certificate of appealability to Respondent Bailey under the authority of 28 U.S.C 2253(c) and Rule 22(b), F.R.A.P., as amended by the "Anti-terrorism and Effective Death Penalty Act of 1996" ("AEDPA"), also appears in the Appendix.

JURISDICTION

The en banc judgment and Opinion of the Court of Appeals for the Eleventh Circuit was entered on December 10, 1996. No rehearing was taken. This petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

Public Law 104-132, 104th Congress (April 24, 1996), 110 Stat. 1214, otherwise known as the "Anti-terrorism and Effective Death Penalty Act of 1996" ("AEDPA"), also appears in the Appendix.

STATEMENT OF THE CASE

In 1991 Bailey was convicted in an Alabama state court on a charge of distribution of a controlled substance. (R1-9-92) After exhausting his state court remedies, Bailey filed a petition for writ

of habeas corpus in the United States District Court for the Middle District of Alabama on March 1, 1995. (R1-1-1) On November 13, 1995, Magistrate Judge Charles S. Coody issued a Recommendation that Bailey's petition be denied. (R1-30-1) On April 24, 1996, the AEDPA was signed into law by President Clinton.

On June 21, 1996, Magistrate Judge Coody issued a second Recommendation that Bailey's habeas petition be denied. (R1-49-1) Ultimately, the Magistrate's Recommendation was adopted by Order of U. S. District Judge Myron Thompson on July 11, 1996, and Bailey's habeas corpus petition was dismissed. (R1-50-1; R1-52-1)

On July 29, 1996, Bailey filed a motion to proceed in forma pauperis in an appeal from the District Court's denial of his habeas petition. (R1-29-1) At the same time, Respondent Bailey filed in the District Court a Motion for Certificate of Probable Cause pursuant to former 28 U.S.C. §2253. (R1-56-1)

On August 21, 1996, the District Court granted Bailey a certificate of appealability under Rule 22(b), F.R.A.P., as amended by the AEDPA. (R1-58-1) In granting Respondent Bailey's certificate of appealability, the District Court noted that, in order to foreclose any concerns that the district court was not empowered to grant the certificate under amended §2253, it had also required Bailey to obtain a certificate of appealability from the United States Court of Appeals for the Eleventh Circuit. (R1-58-1)

On September 23, 1996, the Eleventh Circuit issued an order directing the parties to brief and argue the issue of

whether a district court in an action filed pursuant to 28 U.S.C. §2254, as amended by the AEDPA, had the authority to grant a certificate of appealability. The Eleventh Circuit heard argument in the case en banc on November 20, 1996.

On December 10, 1996, the Eleventh Circuit issued the Opinion below, holding that district courts were authorized to grant certificates of appealability under Rule 22(b), F.R.A.P., and that the issuance of a certificate of appealability to Respondent Bailey by the district court was sufficient to confer jurisdiction under §2253 for the appeal of Respondent's §2254 case.

REASONS FOR GRANTING THE WRIT

1. THE MANNER IN WHICH THE 11TH CIRCUIT RESOLVED THE AMBIGUITY IT PERCEIVED BETWEEN THE "CERTIFICATE OF APPEALABILITY" AMENDMENTS TO F.R.A.P. RULE 22(b) AND 28 U.S.C. §2253(c) RAISES AN IMPORTANT QUESTION OF FEDERAL LAW THAT SHOULD BE SETTLED BY THIS COURT.

This case presents an important issue which for two distinct reasons the Supreme Court should grant certiorari in order to resolve. First, this Court should grant the writ in order to settle the widespread confusion throughout the country in both the district and circuit courts over an aspect of 1996 federal habeas corpus law reform no less important than the manner in which habeas appeals are taken.[1] Second, arguably there is a very real conflict in the way the "certificate of appealability" amendments to §2253 and Rule 22(b) are being interpreted in the various circuits.

---

[1]The 11th Circuit noted in its opinion below that "(b)ecause the issue is an important one involving the proper handling of hundreds of cases per year in this circuit, we took the extraordinary step of granting hearing en banc to resolve the matter." Hunter, 101 F.3d at 1568. Multiplying the stated magnitude of the issue in one circuit across all the circuits illustrates its potential nationwide magnitude.

a. Because the respective scopes of the two provisions are different, there is no ambiguity between §2253(c) and Rule 22(b).

In deciding the instant case, the 11th Circuit sought to interpret an ambiguity that it perceived between the 28 U.S.C. §2253 amendments found in §102 of the AEDPA, and the F.R.A.P. Rule 22 amendments found in §103 of the AEDPA. See Hunter v. U.S., 101 F.3d 1565 (11th Cir. 1996) This ambiguity relates to whether district courts are authorized by the amended provisions of either or both §2253(c) and Rule 22(b) to issue certificates of appealability to habeas corpus petitioners whose petitions have been denied by the district court.

In reaching its conclusion that both §2253(c) and Rule 22(b) authorize district courts to confer jurisdiction for habeas corpus appeals through the issuance of certificates of appealability, the 11th Circuit looked both to general principles of statutory construction and to the legislative history of the AEDPA in order to resolve the apparent ambiguity between the two provisions. In doing so, however, the 11th Circuit overlooked two things. First, the 11th Circuit failed to seriously consider the possibility that the two provisions could be interpreted without finding them ambiguous. Such a "plain language" interpretation of the statute would have obviated the need for the 11th Circuit to apply the general principles of statutory construction that it did. Second, a "plain language" interpretation of the statute would have also obviated the need to look to the legislative history of the AEDPA in order to determine Congress' intent in enacting the two provisions at issue.

Standing alone, nothing about either §2253(c) or Rule 22(b) is particularly ambiguous. It is only when one attempts to reconcile their provisions with one another that the ambiguity arises. Each provision authorizes the judicial officers referenced therein to issue certificates of appealability; Rule 22 authorizes district judges to do so, while §2253 so authorizes circuit justices or judges.

What the Eleventh Circuit essentially failed to recognize in its Opinion below is that, as between §2253(c) and Rule 22(b), it is only §2253(c) that acts to confer appellate jurisdiction. Before passage of the AEDPA, Rule 22(b) gave both district and circuit judges the authority to grant certificates of probable cause, with "the district judge who rendered the judgment" specifically having the first opportunity to issue the certificate. See former F.R.A.P. Rule 22(b). At the same time §2253 provided that "the judge who rendered the order", i.e., the district judge, had a co-extensive authority through the issuance of a certificate of probable cause to also confer jurisdiction for the appeal.

With the AEDPA amendments to §2253(c) and Rule 22(b), Rule 22(b) still gives "the district judge who rendered the judgment" the power in the first instance to issue a certificate of appealablity. What is different now, however, is that district courts are no longer mentioned in a jurisdiction-confering sense in §2253(c). Because district courts are now only refered to in Rule 22(b), they no longer posseess the co-extensive authority to confer jurisdiction for an appeal that they once had.

Thus, a certificate of appealability issued by a district court pursuant to the rule now can only be considered to be a "recommendation" to the circuit court concerning the circuit court's own ultimate exercise of its §2253(c)-based, jurisdiction-confering, certificate issuance authority. In other words, where Rule 22(b) says that --

> . . . an appeal by the applicant for the writ may not proceed unless a district or a circuit judge issues a certificate of appealability pursuant to section 2253(c) . . .

what is meant is that, irregardless of whether a district court issues a certificate of appealability in the first instance pursuant to its authority under Rule 22(b), a certificate of appealability must also be issued "pursuant to section 2253(c)" in order for jurisdiction to be confered for a habeas appeal to go forward. See 28 U.S.C. §2253(c).

Although clearly a limitation on the jurisdiction-confering power of the district court, the fact that the only kinds of judges authorized by §2253 to issue certificates of appealability "pursuant to section 2253(c)" are "circuit justice(s) or judge(s)" in no way affects or diminishes the authority otherwise possessed by the district courts under Rule 22(b) to issue the kind of certificates of appealability that they do have the authority to issue, i.e., ones making a recommendation to a circuit court relative to that court's ultimate disposition of the issue. Nor, as specifically concerned the 11th Circuit below, can such a construction of the AEDPA amendments be said to render Rule 22(b) superfluous in a statutory construction

sense, since under an interpretation such as Petitioner's, Rule 22(b) still has the force and effect of authorizing the issuance of certificate of appealability "recommendations" in habeas appeals in the first instance by district judges. Such a construction also acknowledges and builds on the fact noted by various courts which have addressed the issue, including the 6th Circuit, i.e., that the district court, already being familiar with the case after having denied the petition, is the judicial officer in the best position to initially note those issues which it deems meet the 2253(c)(2) standard. See Lyons, supra. at 4. But none of this changes the fact that it is the issuance of a certificate by a circuit justice or judge" that allows a habeas appeal to, in the words of the first sentence of Rule 22(b), actually "proceed".

The Rules Enabling Act, 28 USC §2072 authorizes this Court to --

> "prescribe general rules of practice and procedure in the United States . . . courts of appeal."

See Willy v. Coastal Corp, 503 U.S. 131, 134, 117 L.Ed. 2d 280, 287, 112 S.Ct. 1076 (1992) However, Willy also recognizes that --

> federal courts, in adopting rules, (are) not free to extend or restrict the jurisdiction conferred by a statute.

Id.; see also Sibbach v. Wilson & Co., 312 U.S. 1, 85 L.Ed 479, 61 S.Ct. 422 (1941).

This is collaterally important to the issue presented here for two reasons. First, it acts to illustrate a premise central to this petition -- that it is not

F.R.A.P., Rule 22 which confers jurisdiction for federal habeas corpus appeals; rather, it is the statute -- 28 USC §2253 -- which does so. Rule 22 in and of itself cannot "abridge, enlarge or modify any substantive right". Willy, Id..

As between the two provisions, it is only §2253(c) which acts to confer appellate jurisdiction. Petitioner asserts that amended Rule 22(b) merely creates a procedure whereby a district court is given an initial opportunity to note those issues for which it determines the petitioner has made the requisite "substantial showing of the denial of a constitutional right". Where a district court initially issues a certificate of appealability, unless a certificate is also issued by a circuit justice or judge, jurisdiction for the appeal is not invoked "pursuant to §2253(c).

b. Because there is no ambiguity between §2253(c) and Rule 22(b), the plain language of the AEDPA should control their interpretation.

Prior to the AEDPA amendments, it was established law that a circuit judge or justice entertaining an application for a certificate of probable cause was bound to give "weighty consideration to its prior denial by a district judge. See Nowakowski v. Maroney, 386 U.S. 542, 543, 18 L.Ed.2d 282, 284, 87 S.Ct. 1197 (1967) Nowakowski held, however, that --

> "(w)hen a district judge grants such a certificate, the court of appeals must grant an appeal . . . and proceed to a disposition of the appeal in accord with its ordinary procedure.

Id. (emphasis added) At the time that Nowakowski was decided, and thereafter up until the enactment of the AEDPA, 28 U.S.C. §2253 provided in pertinent part:

> An appeal may not be taken to the court of appeals from the final order in a habeas corpus proceeding where the detention complained of arises out of process issued by a State court, unless the justice or judge who rendered the order or a circuit justice or judge issues a certificate of probable cause.

(emphasis added) With the adoption of the AEDPA, however, the language referring to the issuance of a certificate by "the justice or judge who rendered the order" was excised from the statute, leaving only the language referring to the issuance of certificates by "a circuit justice or judge".

It is axiomatic that where Congress knows how to say something but chooses not to, its silence is controlling. BFP v. Resolution Trust Corp., 511 U.S. ___, 114 S.Ct. 1757, 1761, 128 L.Ed.2d 556 (1994) Had Congress wanted the amended §2253(c) phrase "circuit justice or judge" to be read "circuit justice or (district) judge", or "circuit justice or judge (who rendered the order)", it could have easily provided for such a reading. This is clearly evidenced by the fact that Congress had already shown in §2253 prior to the AEDPA amendments that it knew how to say "justice or judge who rendered the order", and in the AEDPA amendment to Rule 22(b) that it knew how to say "district judge".

It is generally presumed that Congress acts intentionally and purposely when it includes particular language in one section

of a statute but omits it in another. BFP v. Resolution Trust Corp., supra., quoting Chicago v. Environmental Defense Fund, 511 U.S. ___, 114 S.Ct. 1588, 1593, 128 L.Ed.2d 302 (1994) Furthermore, under accepted canons of statutory construction, legal terms used in framing a statute are ordinarily presumed to have been intended to convey their customary legal meaning. See Bradley v. United States, 410 U.S. 605, 609, 93 S.Ct. 1151, 1154-55, 35 L.Ed.2d 528 (1973); see also Singer, 2A Sutherland Stat. Constr. §47.30 at p. 262 (5th ed. 1992)

Petitioner's position is that the phrase "circuit justice or judge", as used in §2253 both before and after the AEDPA, is such a legal term of art, entitled to its customary legal meaning. The particular legal meaning at issue here relates to the fact that, under both the former and, presumably, the present law, certificates under §2253 could and can be issued both by the individual judges of the courts of appeals, or by a Supreme Court Justice in his or her capacity as a Circuit Justice. See Parker v. Norris, 929 F.Supp. 1190, 1191 (E.D.Ark. 1996), citing Rosoto v. Warden, 375 U.S. ___, 83 S.Ct. 1788, 11 L.Ed.2d 15 (1963); In re Burwell, 350 U.S. 521, 522, 76 S.Ct. 539, 540, 100 L.Ed.2d 666 (1956) Accordingly, the word "judge" in the phrase "circuit justice or judge" has absolutely nothing to do with district judges, and it would be a highly strained reading indeed that would seek to force such a meaning. C.f. Witt v. Edwards, 1996 WL 719249 (N.D. Ohio); Burke v. United States, 1996 WL 711270 (E.D. Pa.)

c. Even if there is ambiguity between the provisions of §2253(c) and Rule 22(b) on the issue of whether district courts are authorized to confer jursidiction for the appeal of an habeas corpus case, the legislative history cited by the Eleventh Circuit to resolve this ambiguity is inapplicable.

In its en banc Opinion below, the 11th Circuit held --

> "The legislative history leading up to the enactment of the AEDPA §§102-103 amendments to 28 U.S.C. 2253 and to the Federal Rules of Appellate Procedure 22(b) does not convince us that Congress intended to divest district judges of the authority to issue certificates of appealability. To the contrary, the legislative history of the amendment indicates otherwise. It certainly does not override the force of the decisional law requiring that we give all the language of both §2253(c) and Rule 22(b), as amended, effect.

See Hunter v. U.S., 101 F.3d 1565, 1583 (11th Cir. 1996)

Upon close inspection of the legislative history referenced in Hunter, it becomes clear that this history relates neither to S. 735 nor to H. 2703, the two bills ultimately enacted by Congress as the AEDPA. Rather, the legislative history upon which the 11th Circuit based its opinion that Congress intended in its 1996 reform to drop what had commonly been referred to as the "Judge Friendly proposal" for placing the authority to grant habeas appeals solely

in the circuit courts -- a provision that for decades had been a part of every significant habeas corpus reform effort -- apparently relates to two other versions of the bill that were not, in fact, adopted, i.e., S. 623 and H.R. 729. As pointed out recently by Sixth Circuit in Lyons v. Ohio Adult Parole Authority, 1997 WL 20401 {6th Cir.(Ohio)} this kind of legislative history, i.e., that consisting of statements made by persons in favor of rejected or failed bills, is meaningless and cannot be used as an extrinsic aid to the interpretation of the provisions of a different bill ultimately enacted. Id. at p. 6, citing Singer, 2A Sutherland Stat. Constr. §48.01 at p. 302 (5th ed. 1992).

Thus, the very legislative history cited by the 11th Circuit as determinative of the intent of Congress in actuality provides no assistance in the resolution of the ambiguity between §2253(c) and Rule 22(b) on the issue of the how to treat a certificate of appealability issued by a district court under the AEDPA.

2. BECAUSE OF THE PERCEIVED AMBIGUITY BETWEEN THE "CERTIFICATE OF APPEALABILITY" AMENDMENTS TO F.R.A.P. RULE 22(b) AND 28 U.S.C. §2253(c), A PROCEDURAL CONFLICT EXISTS AMONG THE CIRCUITS THAT SHOULD BE SETTLED BY THIS COURT.

The 11th Circuit in the present case, and the 6th Circuit in Lyons v. Ohio Adult Parole Authority, 1997 WL 20401 {6th Cir.(Ohio)}, have similarly decided the certificate of appealability issue in lengthy opinions. Each of these circuits resolved the apparent ambiguity between the language of 2253(c) and Rule 22(b) on the

issue of whether district courts are authorized under the AEDPA to issue certificates of appealability in habeas corpus cases by determining that the only way under general principles of statutory construction to give force and effect to the language of Rule 22(b) is to give the commonly known and previously used §2253 legal phrase "circuit justice or judge" an entirely new meaning, one that includes within its scope district court judges.

On the other hand, the 5th Circuit in Else v. Johnson, 104 F.3d 82 (5th Cir. 1997) has come to the same conclusion, but under a different analysis. The 5th Circuit, in recently holding in Else that it was Rule 22(b) that authorized district judges to issue certificates, specifically criticized the 11th Circuit's Hunter rationale that found support for the issuance of certificates of appealability by district judges in the text of §2253(c). See Else, supra., at fn. 1.

In effect, what it appears the 5th Circuit has done is to adopt a wait-and-see approach similar to those instituted by temporary rule in the 1st and 7th Circuits. See Lyons, supra. at 3. Unlike the 5th and 11th Circuits, the 1st and 7th Circuits have adopted circuit rules to manage the perceived ambiguity between §2253(c) and Rule 22(b). The 7th Circuit's interim rule allows its district courts to issue certificates of appealability and requires a petitioner to make an initial application to the district court before asking a circuit judge for a certificate. See 7th CIR.R. 22.1(b) (Interim Rule) ("Every request for a certificate of appealability must be made initially to a judge of the district court.") If the district judge issues the

certificate, the petitioner's appeal goes forward. Lyons, supra. at 3.

The 1st Circuit's rule does the same, except that its rule requires that, even where a certificate has been issued by the district judge, a certificate from a circuit judge or justice must also be issued in order to allow the appeal to go forward "pursuant to §2253(c)". See 1st CIR.R. 22.1(b) (Interim Rule) ("In this circuit, ordinarily neither the court nor a judge thereof will initially receive or act on a request for a certificate of appealability if the district judge who refused the writ is available unless an application has first been made to the district court judge.") It is only this second certificate of appealability, issued by the circuit court, which allows the appeal to be processed. Lyons, supra. at 3.

Thus, of the five circuits that have addressed the issue, two have read §2253(c) to allow district courts to issue jurisdiction-confering certificates of appealability, one has found the authority for district courts to issue jurisdiction-confering certificates solely in Rule 22(b), one has enacted a temporary circuit rule that allows both district and circuit judges to issue the jurisdiction-confering certificates, and one -- the 1st circuit -- has adopted a circuit rule that sets forth a procedure of the sort that Petitioner Nagle would argue is, in fact, the one most representative of the post-AEDPA balance between §2253(c) and Rule 22(b) apparently intended by Congress.

The 1st Circuit's process requires that applications for certificates of appealability be considered first in the district court, so as to allow the lower

court the first opportunity to note any issues it feels meet the §2253(c)(2) standard. If the district court grants its certificate of appealability, the circuit court must also then grant its own certificate of appealability in order for the appeal to go forward. If the district court fails to issue a certificate, the circuit court can still solely confer jurisdiction for the appeal by issuing its certificate of appealability.

This Court is being called on here to settle the widespread confusion throughout the country that the amendments to these statutory law provisions have engendered. In so doing, however, it may be necessary for this Court to re-visit certain decisional law, specifically, its prior holding in Nowakowski v. Maroney, 386 U.S. 542, 18 L.Ed.2d 282, 87 S.Ct. 1197 (1967)

In Nowakowski this Court instructed circuit courts on how, under the former law, they were to treat district court certificates of probable cause. At the time that Nawakowski was decided, 28 U.S.C §2253 contained language that, for the reasons stated infra., supported this Court's conclusion that the issuance of a certificate of probable cause by a district court compelled the circuit court to process and dispose of the appeal.

The 5th, 6th, 7th and 11th Circuits, not to mention the numerous district courts, are now interpreting amended §2253(c) and amended Rule 22(b) so as to read the Nawakowski standard directly into the new provision. However, because of the AEDPA amendments to §2253, Petitioner Nagle asserts that the explicit language of amended §2253(c) now justifies a different conclusion. Only a clear statement by this

Court addressing the effect of the AEDPA amendments on the Nowakowski standard can properly and effectively settle this matter.

CONCLUSION

There is no ambiguity between §2253(c) and Rule 22(b), if you consider the fact that §2253 is the statutory/jurisdictional basis for habeas appeals, and that Congress specifically amended §2253 via the AEDPA to take out any reference in that jurisdictional statute to district courts. Under this view, the remaining power that district courts have under Rule 22(b) to issue certificates is a power more in the nature of a "recommendation" than it is a co-equal method of conferring jurisdiction for habeas appeals. Thus, a certificate issued under Rule 22(b) is, in fact, a "recommendation" -- a concept already common to habeas jurisprudence, i.e., the magistrate recommends initial disposition to the district judge, the district judge recommends appealable issues to the circuit judge, the circuit judge decides which issues, if any, merit an appeal, and disposes of the appeal.

In order for jurisdiction for a habeas appeal to be conferred, however, irregardless of what the district court does, the circuit court must issue a certificate of appealability under §2253(c). The authority to issue a certificate under Rule 22(b) and the authority to confer jurisdiction for a habeas appeal being two seperate things, there is no ambiguity in the statute.

Even if there is ambiguity in the statute, the legislative history cited by the 11th Circuit to resolve the ambiguity

below contrary to Petitioner Nagle's position is inapplicable, because it relates to versions of the bill that were not the ones finally enacted. Thus, at a minimum this Court should at least take a fresh look at the resolution of any ambiguity that it deems to exist in the amended provisions of §2253 and Rule 22.

Respectfully submitted,

BILL PRYOR
ATTORNEY GENERAL
BY:

_____
STEPHEN N. DODD
ASSISTANT ATTORNEY GENERAL

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OFFICE OF THE CLERK

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JOHN E. NAGLE, ET AL., Petitioner,

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HENRY C. BAILEY, Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

APPENDIX TO THE PETITION OF THE STATE OF ALABAMA

OF
BILL PRYOR
ATTORNEY GENERAL

AND

STEPHEN N. DODD*
ASSISTANT ATTORNEY GENERAL

ATTORNEYS FOR PETITIONER

ADDRESS OF COUNSEL:

Office of the Attorney General
Criminal Appeals Division
11 South Union Street
Montgomery, Alabama 36130
(334)242-7300

*Counsel of Record

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APPENDIX A

Charles Edward HUNTER,
Petitioner-Appellant,

v.

UNITED STATES of America,
Respondent-Appellee.

Henry C. **BAILEY**, Petitioner-Appellant,

v.

John E. **NAGLE**, Warden, Jeff Sessions,
Attorney General for the State of
Alabama, Respondent-Appellee

Nos. 96-6513, 96-6770.

United States Court of Appeals,
Eleventh Circuit.

Dec. 10, 1996.

State inmate filed applications for relief in nature of habeas corpus. The United States District Court for the Middle District of Alabama, No. CV-95-T-262-N, Myron H. Thompson, Chief Judge, entered order dismissing inmate's application, and inmate appealed. In second case, defendant who had been convicted in federal court filed motion for relief from sentence. The United States District Court for the Northern District of Alabama, Nos. 96-N-8032-S and 89-CR-14-ALL, Edwin L. Nelson, J., entered order denying defendant's motion, and defendant appealed. The Court of Appeals, Carnes, Circuit Judge, held that: (1) amended statute governing appeals in habeas corpus and post-conviction relief proceedings applied to habeas cases in which no certificate or probable cause to appeal was obtained before statute's

effective date and to postconviction proceedings in which no notice of appeal was filed before statute's effective date, and (2) district court judges continued to have authority to issue certificates of appealability under amended statute.
So ordered.

1. Criminal Law Key 1005
Habeas Corpus Key 205

Statute governing appeals in habeas corpus and postconviction relief proceedings, as amended by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), applied to all habeas cases in which no certificate of probable cause to appeal was obtained under preexisting law before the effective date of AEDPA, and to all postconviction relief cases in which no notice of appeal was filed before AEDPA's effective date. 28 U.S.C.A. §§2253(c), 2254, 2255; F.R.A.P.Rule 22(b), 28 U.S.C.A.

2. Statutes Key 262, 263

Court's first task, in deciding whether newly enacted statutory provision applies to pending cases, is to determine whether Congress has expressly prescribed statute's proper reach; only if Congress has not expressly prescribed statute's proper reach will court apply judicial default rules.

3. Criminal Law Key 978
Habeas Corpus Key 205

Even assuming that some clear expression of legislative intent short of express statutory command is enough to avoid application of judicial default rules in deciding whether newly enacted statutory provision should be applied to pending cases, mere fact that Congress had expressly

provided that one section of the Antiterrorism and Effective Death Penalty Act (EADPA) was to apply to pending cases could not be regarded as clear expression of Congress' intent that another section of the AEDPA, for which no such provision was made, was not to be applied in cases filed prior to its effective date, where Congress had also specified that other sections of the AEDPA were not to be applied to pending cases; lack of any expression as to Congress' intent with respect to provision at issue could not be interpreted one way or the other, where Congress elsewhere provided that some sections of the AEDPA were to be applied to pending cases, while others were not. 28 U.S.C.A. §2253(c).

4. Constitutional Law Key 190

Applying newly enacted statutory provision to pending case will not result in prohibited "retroactive effect," within meaning of Landgraf judicial default rules, merely because statute is applied to case that arose before statute was enacted, or merely because party has reduced chance of prevailing in pending case if statute is so applied.

See publication Words and Phrases for other judicial constructions and definitions.

5. Constitutional Law Key 190
Statutes Key 265, 266

For purposes of judicial default presumption against retroactive application of newly enacted statute, new statute will have "retroactive effect" if applying it to pending case would impair rights that party possessed when he acted, increase party's liability for past conduct, or impose new duties with respect to transactions already completed.

6. Constitutional Law Key 190, 191
Statutes Key 267(2)

Application of newly enacted statute to pending case will not result in any prohibited impairment of party's preexisting "rights," thereby triggering judicial default presumption against retroactive application, merely because it interferes with party's expectation interests under procedural or remedy rules; term "rights" as used in this context, should not be construed so broadly as to sweep within its ambit mere expectation interests under procedural or remedy rules.

See publication Words and Phrases for other judicial constructions and definitions.

7. Constitutional Law Key 191

Statutory changes in procedural rules may often be applied in suits arising before their enactment, without raising concerns about retroactivity.

8. Criminal Law Key 1073
Habeas Corpus Key 818

Statute governing appeals in habeas corpus and postconviction relief proceedings, as amended by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), continued to permit district court judges to issue certificates of appealability in habeas corpus and postconviction relief proceeding; authority to issue such certificates is not limited to circuit court judges. 28 U.S.C.A. §§2253(c), 2254, 2255; F.R.A.P.Rule 22(b), 28 U.S.C.A.

9. Statutes Key 206

Test of each provision of act or statute should be read in way that gives effect to all such provisions.

G. Douglas Jones, Birmingham, AL, for Charles Edward Hunter.

Caryl Privett, Frank M. Salter, U.S. Attorney's Office, Birmingham, AL, David Kris, U.S. Department, Washington, DC, for U.S.

William R. King, Federal Public Defender, Middle District of Alabama Federal Defender Program, Inc., Montgomery, AL, for Henry C. Bailey.

Norbert Hershael Williams, Stephen N. Dodd, Office of the Attorney General, Montgomery, AL, for John E. Nagle and Jeff Sessions.

Appeal from the United States District Court for the Northern District of Alabama.

Appeal from the United States District Court for the Middle District of Alabama.

Before HATCHETT, Chief Judge, and TFOFLAT, KRAVITCH, ANDERSON, EDMONDSON, COX, BIRCH, DUBINA, BLACK, CARNES and BARKETT, Circuit Judges.

CARNES, Circuit Judge:

We heard these cases en banc to decide whether a district court judge is authorized to issue a certificate of appealability pursuant to 28 U.S.C. §2253c) and Federal Rule of Appellate Procedure 22(b), as amended by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub.L. No.

104-132, 110 Stat. 1214. We answer that question in the affirmative. We also decide that the AEDPA amendments to §2253(c) and Rule 22(b) apply to all 28 U.S.C. §2254 cases in which no certificate of probable cause to appeal was obtained under preexisting law before the effective date of the Act, and to all 28 U.S.C. §2255 cases in which no notice of appeal was filed before that effective date.

I. PROCEDURAL HISTORY

A. The Bailey Case

Henry C. Bailey is an Alabama inmate who is serving a life sentence imposed in 1991 under Alabama's Habitual Felony Offender Act, see Ala. Code §13A-5-9 (1975), as a result of his conviction for distribution of a controlled substance in violation of Ala. Code §13A-12-211 (1975). After exhausting his state court remedies, Bailey filed a 28 U.S.C. §2254 application for relief in the Middle District of Alabama on February 24, 1995. Adopting a magistrate judge's report and recommendation that relief be denied, the district court dismissed Bailey's application on July 11, 1996.

Thereafter, Bailey filed a notice of appeal, a motion to proceed in forma pauperis on appeal, and a motion for a certificate of probable cause to appeal. In an August 21, 1996 order, the district court granted Bailey's In forma pauperis motion. By separate order that same date, the district court treated Bailey's motion for a certificate of probable cause as a motion for a certificate of appealability under 28 U.S.C. §2253(c) and Rule 22(b), as amended. Even though the court granted Bailey a certificate of appealability, it acknowledged that there was an unsettled question of law

about whether a district judge is authorized to do so. More specifically, the court noted that §2253(c)(1), as amended, provides that a "circuit justice or judge" may issue a certificate of appealability, while the amended Rule 22(b) provides that a "district or a circuit judge" may do so. The court warned Bailey that he might be required to request a certificate of appealability from this Court. He has not done so.

In granting Bailey a certificate of appealability, the district court applied the "substantial showing of the denial of a constitutional right" standard set out in §2253(c)(2). However, the court did not specify, as required by §2253(c)(3), which of the multitude of issues Bailey had raised met that standard.

B. The Hunter Case

In 1990, following a guilty plea, Charles Edward Hunter was convicted in the United States District Court for the Northern District of Alabama of one count of possessing cocaine with intent to distribute it, in violation of 21 U.S.C. §841(a)(1), and of one count of using and carrying a firearm during and in relation to a drug trafficking offense, in violation of 18 U.S.C. §924(c). He was fined $10,000.00, and sentenced to eighty-four months imprisonment to be followed by five years of supervised release.

In 1991 Hunter filed an initial 28 U.S.C. §2255 motion for relief from his sentence. The motion was denied, and this Court affirmed that denial. Hunter filed another §2255 motion in 1991, which was also denied. In 1995, Hunter filed yet another motion for §2255 relief, which the district court dismissed as "utterly frivolous."

This appeal results from Hunter's latest §2255 motion, which he filed on March 15, 1996, and the district court denied on April 24, 1996. On May 17, 1996, Hunter filed a notice of appeal and motion to proceed in forma pauperis. On May 30, 1996, the district court granted that motion, and it treated the notice of appeal as including an application for a certificate of appealability.

The district court expressed doubt about whether it was authorized to grant a certificate of appealability, stating: "There are substantial internal inconsistencies between the amended §2253 and the amended Rule 22, which make it unclear whether this court is intended or indeed has the authority to issue a certificate of appealability from the denial of a section 2255 motion." Nonetheless, "[o]ut of an abundance of caution," the district court certified that Hunter had made a substantial showing of the denial of a constitutional right regarding one issue, which it specified in the order.[1]

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[1]The district court granted Hunter a certificate of appealability notwithstanding the fact that this is his at least fourth 28 U.S.C. §2255 motion. The United States has not raised, and neither side has addressed, the question of whether provisions of the last paragraph of §2255, as amended, relating to second or successive motions, apply to Hunter's case. We do not decide that issue, nor do we mean to imply any view about it.

C. The Grant of Review

Because the issue is an important one involving the proper handling of hundreds of cases a year in this circuit, we took the extraordinary step of granting hearing en banc to resolve the matter. We directed parties in Bailey to address the issue of whether a district court is authorized to issue a certificate of appealability in 28 U.S.C. §2254 cases, and we directed the parties in Hunter to address the same issue involving 28 U.S.C. §2255 cases. We also invited the other two states in our circuit, as well as a number of defender organizations, to file amici briefs. Before reaching the issue for which we granted hearing en banc, we must first resolve a preliminary issue the parties have raised.

II. THE APPLICABILITY OF THE AEDPA AMENDMENTS TO PENDING CASES

[1] In addition to briefing and arguing the issue we posed, Bailey and Hunter contend that the AEDPA amendments to 28 U.S.C. §2253(c) and to Federal Rule of Appellate Procedure 22(b) are not applicable to their cases, because the proceedings, although not the appeals, were already pending on April 24, 1996, the AEDPA's effective date. In Bailey's case, his application for 28 U.S.C. §2254 relief was filed before that effective date, but it was not denied and a notice of appeal filed until after the effective date. In Hunter's case, his motion for 28 U.S.C. §2255 relief was filed before but denied on AEDPA's effective date, and his notice of appeal was filed after that date.

[2] Landgraf v. USI Film Products, 511 U.S. 244, 114 S.Ct. 1483, 128 L.Ed.2d 229 (1994), provides the analytical framework for

determining whether newly enacted statutory provisions are applicable to pending cases. A court's first, and sometimes last, task under Landgraf analysis is "to determine whether Congress has expressly prescribed the statute's proper reach." Id. at ___, 114 S.Ct. at 1505. If Congress has done so, that is the end of the Landgraf analysis, and the court simply follows the evidence intent of Congress. Id. However, where the congressional intent about applicability to pending cases is not evident, or is nonexistent, more is required. The more that is required is application of the judicial default rules specified in Landgraf, to which we will return later.

[3] Taking the first Landgraf step, we look to see if Congress expressly prescribed whether the amendments to §2253(c) and to Rule 22(b), which are contained in §§102 and 103 of the AEDPA, were applicable to pending cases. Congress said nothing one way or the other. Hunter and Bailey[2] do not dispute that there is no express congressional direction on the matter, but they do contend that the AEDPA implicitly indicates an intent not to apply these amendments to pending cases. They point to §107(c) of the Act.

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[2]For the sake of simplicity, our discussion will attribute to Hunter and Bailey not only their own arguments but also the arguments on the same issues made in the amicus curiae brief filed jointly by the Equal Justice Initiative of Alabama, the Georgia Appellate Practice and Educational Resource Center, and the Capital Collateral Representative of Florida.

Section 107 sets out special rules for capital cases in certain qualifying jurisdictions, and subsection (c) of it expressly provides that those new rules are applicable to pending cases. The argument is that since Congress expressly provided that §107 was to apply to pending cases, but did not so provide for §§102 and 103, Congress must have intended for those two sections not to apply to pending cases.

We reject that argument. To begin with, we note that the argument assumes that evidence of legislative intent, short of an explicit statutory command about the provision in question, is enough to avoid application of the Landgraf judicial default rules. There appears to be a conflict among the circuits, and even within some circuits, about whether Landgraf's first step can be satisfied by evidence of legislative intent other than in an express statutory command. Compare, e.g., Brown v. Hot, Sexy & Safer Prods, Inc., 68 F.3d 525, 538 (1st Cir. 1995) (requiring clear statutory language demanding retroactivity), cert. denied, ___ U.S. ___, 116 S.Ct. 1044, 134 L.Ed.2d 191 (1996) and Reyes Hernandez v. INS, 89 F.3d 490, 492 (7th Cir. 1996) (presumption against retroactivity "unless the statute provides explicitly for retroactive application"; requires "clear statement") and Chenault v. U.S. Postal Serv., 37 F.3d 535, 537 (9th Cir. 1994) (presumption against retroactivity unless statute's language dictates retroactivity) with Green v. Nottingham, 90 F.3d 415, 419 (10th Cir. 1996) (considering both language of act and legislative history in search of "unambiguous directive") and Conservation Law Foundation, Inc. v. Busey, 79 F.3d 1250, 1270 (1st Cir. 1996) (holding that legislative history "left no doubt" that retroactivity was contemplated) and U.S. v. $814,254.76 in U.S. Currency, 51 F.3d 207, 212 (9th Cir.

1995) (considering legislative history for evidence of "clear congressional intent" to apply statute retroactively). We need not resolve that question, because even assuming that clear legislative intent short of an express statutory command suffices to overcome any of Landgraf's presumptions, there is no clear legislative intent about application of §§102-103 of the AEDPA to pending cases.

It is true that §107(c) specifies that the changes contained in that particular section shall apply to pending cases. But it is equally true that a number of other AEDPA provisions specify that other changes made by the same act do not apply to pending cases. See, e.g., AEDPA §211 (making changes in restitution law and procedures applicable only to "sentencing proceedings in cases in which the defendant is convicted on or after the date of enactment"); §235(h) (provisions concerning closed circuit television of court proceedings apply only to cases filed after January 1, 1995); §435 (provision expanding criteria for deporting aliens convicted of crimes of moral turpitude applicable to those "against whom deportation proceedings are initiated after the date of enactment"); §441 (amendment limiting collateral attacks on deportation orders applicable only where criminal proceedings initiated after the date of enactment); §903 (making changes in the rate of compensation of appointed counsel in certain capital cases apply only to cases commenced or appeals perfected "on or after the date of the enactment").

The fairest inference from the variety of applicability provisions throughout the AEDPA is that Congress was quite capable of and willing to express its intent about prospective or retrospective application when it had such an intent. See Landgraf, ___

U.S. at ___, 114 S.Ct. at 1493-94. Where Congress was silent on the subject, as it was regarding the amendments made by §§102 and 103, courts must proceed as though Congress either had no intent or chose to refrain from expressing any intent it had. That brings us to Landgraf's second step, application of its judicial default rules.[3]

[4] Under the Landgraf judicial default rules, a newly enacted statutory provision is to be applied to pending cases, including appeals, unless doing so would give the provisions "retroactive effect." Id. at ___, 114 S.Ct. at 1506. If applying the new provision to a pending case would have retroactive effect, then the presumption goes the other way; absent an express congressional command, statutory provisions are not to be given retroactive effect. Id.

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[3]Hunter and Bailey also put forward a more complex argument concerning the implication of certain provisions of §107 for the applicability of §§102 and 103 pending cases. Briefly, the argument is that because Congress provided in §107(a) (in the new 28 U.S.C. §2264(b)) that only certain specific provisions of §2254, as amended in §§101-106, would apply in §107 capital case proceedings, Congress must have meant the other §§101-106 changes to be inapplicable to pending cases. The Seventh Circuit, sitting en banc, recently addressed and rejected this argument. Lindh v. Murphy, 96 F.3d 856, 862 (7th Cir. 1996). We agree with the discussion in the Lindh opinion and reject the argument for the same reasons.

at ___, ___, 114 S.Ct. at 1501, 1506. But "retroactive effect" for these purposes means more than simply the effect of applying a statute to a case that arose before the statute was enacted, and it means more than simply a reduced chance of prevailing in a pending case if the statute is applied. See id. at ___, 114 S.Ct. at 1499 ("A statute does not operate 'retrospectively' merely because it is applied in a case arising from conduct antedating the statute's enactment or upsets expectations based in prior law.") (citation and footnote omitted); Lindh v. Murphy, 96 F.3d 856, 863 (7th Cir. 1996) (en banc) (the possibility of an adverse effect is not the definition of "retroactive effect"). For purposes of the Landgraf judicial default rules presumption, applying a statute to a pending case has "retroactive effect" only when doing so produces a "'genuinely' retroactive effect" and constitutes "truly 'retrospective' application." Id. at ___, 114 S.Ct. at 1503-04.

In other words, in Landgraf analysis, "retroactive effect" is a term of legal art, which does not describe all applications of a statute to preexisting causes of action or pending proceedings. The definition of "retroactive effect" in this context is more narrow than that, and it conveys less of a description of premises than an announcement of a conclusion, an end-of-the-analysis label. As the Supreme Court explained, "The conclusion that a particular rule operates 'retroactively' comes at the end of a process of judgment concerning the nature and extent of the change in the law and the degree of connection between the operation of the new rule and a relevant past even." Id. at ___, 114 S.Ct. at 1499.

[5] Fortunately, the Landgraf opinion is more specific than that. It explains that for purposes of the judicial default presumption against retroactive application, a new statute would have a retroactive effect if applying it to a pending case "would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." Id. at ___, 114 S.Ct. at 1505. We now focus that definition upon the specific provisions of the AEDPA that are at issue in this case.

We realize that the changes involving appeal certificates made by §§102 and 103 of the AEDPA are greater as they affect federal inmate §2255 movants than as they affect state inmate §2254 applicants to obtain a certificate of probable cause to appeal as a prerequisite to appellate review of a district court judgment denying relief. 28 U.S.C. §2253 (1995); Fed. R.App. P. 22(b) (1995). The most that §§102 and 103 of the AEDPA have done to §2254 applicants is reduce the likelihood of them obtaining such a certificate, now called a certificate of appealability, and possibly narrow the scope of any appeal that is permitted. See §2253(c)(3).[4]

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[4]In speaking of the possibility that the AEDPA amendments have reduced the likelihood of a §2254 applicant obtaining the necessary certificate, we are referring primarily to the State of Alabama's contention that the amendments divested district judges of the authority to issue such certificates, thereby removing one of the opportunities an

(Footnote Continued)

By contrast, unsuccessful §2255 movants

(Footnote Continued)
applicant had to obtain a certificate. In speaking of the possibility that the amendments have narrowed the scope of any permitted appeal, we are referring to §2253(c)(3), as amended, which provides that the certificate must "indicate which specific issue or issues satisfy the showing required by [§2253(c)(2)]." That provision may limit the appeal to the issues specified, but we need not decide whether it does; the result of our analysis is the same, regardless.

The result of our analysis is also unaffected by the issue of whether the AEDPA amendments have changed the actual standard for obtaining the necessary certificate. There is some difference of opinion about whether §2253(c)(2), which provides that a certificate of appealability may issue "only if the applicant has made a substantial showing of the denial of a constitutional right," modifies preexisting law, which defined the required showing as, as "substantial showing of the denial of [a] federal right," Barefoot v. Estelle, 463 U.S. 880, 881, 103 S.Ct. 3383, 3388, 77 L.Ed.2d 1090 91983) (citation and internal quotation marks omitted) (alteration in original). Compare Drinkard v. Johnson, 97 F.3d 751, 756 (5th Cir. 1996) (holding that at least in §2254 proceedings, the standard for issuance of a certificate of appealability after the AEDPA amendments is the same as the standard for issuance of a certificate of probable cause to appeal under preexisting law) and Reyes v. Keane,
(Footnote Continued)

were not required by preexisting law to obtain a certificate as a prerequisite to an appeal. They could appeal without without getting a judge to certify anything about the possible merit of their issues. Sections 102 and 103 of the AEDPA changed that, subjecting §2255 movants to pre-appeal certification requirements (the same ones that apply to §2254 applicants). However, because the same analysis applies in both types of cases, and produces the same result, our discussion will make no distinction between §2254 applicants, such as Bailey, and §2255 movants, such as Hunter. It is enough for present purposes to assume that the new act makes it materially more difficult for both state federal inmates to appeal and thereby obtain an appellate review of district court judgments denying collateral relief.

[6] With that assumption in mind, and turning to the definition of "retroactive" in Landgraf, it is obvious that applying these new certificate of appealability requirements to pending cases would not "increase a

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(Footnote Continued)
90 F.3d 676, 679-80 (2d Cir. 1996) (same) and Lennox v. Evans, 87 F.3d 431, 434 (10th Cir. 1996) (same) with Williams v. Calderon, 83 F.3d 281, 286 (9th Cir. 1996) (stating that the standard for obtaining a certificate of appealability under the AEDPA amendments is "more demanding" than the Barefoot standard for certificate of probable cause to appeal). For present purposes, we will assume that the amendments have raised the hurdle for obtaining the certificate that is a prerequisite to an appeal from the denial of relief.

party's liability for past conduct," nor would it "impose new duties with respect to transactions already completed." ___ U.S. at ___, 114 S.Ct. at 1505; see Drinkard v. Johnson, 97 F.3d 751, 766 (5th Cir. 1996) (holding that a habeas applicant "cannot argue that the new standards of review attach new legal consequences to [his criminal] conduct by increasing his liability for that conduct or by imposing new duties on him based on that conduct").[5] That leaves only the question of whether application of the new certificate of appealability requirements to pending cases "would impair rights a party possessed when he acted." ___ U.S. at ___, 114 S.Ct. at 1505. The key word here, of course, is "rights." If that term is broadly construed to include expectations under preexisting procedural rules, or under rules affecting access to and the propriety of review and remedies, then applying the new certificate of appealability rules to pending cases possibly would have a retroactive effect." But we know that the term "rights" as used in this context should not be construed broadly so as to sweep within its ambit mere expectation interests under procedural or remedy rules.

[7] We know that about procedural rules, because the Supreme Court in Landgraf noted that procedural rules "regulate secondary rather than primary conduct," so there are "diminished reliance interests in matters of

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[5]We do not have before us, and we do not pretend to address, the question of whether §2254(d)(1), as amended, applies to pending cases.

procedure." Id. at ___, 114 S.Ct. at 1502. As a result, "[c]hanges in procedural rules may often be applied in suits arising before their enactment without raising concerns about retroactivity." Id. at ___, 114 S.Ct. at 1502. Often, usually, but not always. The two illustrative exceptions the Court gave are that a new procedural rule about the filing of complaints should not be applied to a case where the complaint already had been filed under the old regime, and new rules of evidence should not be applied to an already-tried case so as to require an appellate remand for a new trial. Id. at n. 29. Those exceptions "reflect the common-sense notion that the applicability of such provisions ordinarily depends on the posture of the particular case." Id.

The posture of Bailey's case at the time the AEDPA went into effect is that he, as a §2254 applicant, had not obtained a certificate of probable cause to appeal under preexisting law. See Lindh, 96 F.3d at 863 ("We take it that under Landgraf a certificate of probable cause to appeal issued before April 24, 1996, authorizes an appeal, although after April 24 appeal depends on a 'certificate of appealability' under §102 of the 1996 Act."). The posture of Hunter's case at the time the AEDPA went into effect is that he, as a §2255 movant, had not filed a notice of appeal under preexisting law. Cf. United States v. Lopez, 100 F.3d 113, 117 (10th Cir. 1996) (holding that the certificate of appealability amendments to §2253 do not apply to a §2255 appeal in which the notice of appeal was filed before the AEDPA's effective date). Nor are the AEDPA amendments to §2253(c) and Rule 22(b) changes in evidentiary rules the application of which would require a new trial in these cases. Therefore, viewing §2253(c) and Rule 22(b) as procedural rules

argues strongly for the conclusion that the AEDPA amendments to them should be applied to Bailey's and Hunter's cases.

Characterizing §2253(c) and Rule 22(b) as remedial provision does not result in a different conclusion. The Supreme Court in Landgraf also said: "When the intervening statute authorizes or affects the propriety of prospective relief, application of the new provision is not retroactive." Id. at ___, 114 S.Ct. at 1501. The Court gave as an example a prior decision holding that a change in a remedial statute was due to be applied to a case on appeal, even if the result was to deprive the plaintiff of relief granted to him under the law in effect at the time judgment was entered by the district court. Id. at ___, 114 S.Ct. at 1501 (citing American Steel Foundries v. Tri-City Central Trades Council, 257 U.S. 184, 42 S.Ct. 72, 66 L.Ed. 189 (1921)).

Moreover, the Landgraf Court recounted with approval that it had "regularly applied intervening statutes conferring or ousting jurisdiction, whether or not jurisdiction lay when the underlying conduct occurred or when the suit was filed." Landgraf, ___ U.S. at ___, 114 S.Ct. at 1501. An example it gave was Bruner v. United States, 343 U.S. 112, 116-17, 72 S.Ct. 581, 584-85, 96 L.Ed. 786 (1952), which ordered a case dismissed, though there was jurisdiction for it initially, because the statute upon which that jurisdiction was based had been repealed while the case was pending. Landgraf, ___ U.S. at ___, 114 S.Ct. at 1501. The reason that "[p]resent law normally governs in such situations [is] because jurisdictional statutes 'speak to the power of the court rather than to the rights or obligations of the parties.'" Id. at ___, 114 S.Ct. at 1502 (quoting Republic National Bank of Miami v.

U.S., 506 U.S. 80, 100, 113 S.Ct. 554, 565, 121 L.Ed.2d 474 (1992) (Thomas, J., concurring)).

In applying these principles, we readily conclude that §§102 and 103 of the AEDPA, the amendments relating to certificates of appealability, may be accurately characterized as rules of procedure. They might also be characterized as changes in the law affecting access to and the propriety of prospective relief. Applying such changes to pending cases is not giving them retroactive effect under the Landgraf judicial default rules. See Lindh, 96 F.3d at 865 ("The Supreme Court consistently applies statutory changes in the law of collateral attack to pending cases, and perforce to newly filed cases that seek relief from judgments entered before the statute's enactment."). Indeed, that conclusion follows even if the certificate of appealability changes are characterized as affecting the jurisdiction of the court of appeal. However the §§102 and 103 changes are characterized, applying them to pending cases does not give them "retroactive effect" as that term is used in Landgraf, so the presumption that present law applies to present cases governs. See Lindh, 96 F.3d at 865 ("To leave the ensuing judgment in force -- and to leave all the rules governing primary conduct intact -- is not 'retroactive' in the sense Landgraf uses that term....").

The same conclusion follows if we look beyond the categorical approach and seek to determine whether there is any significant "degree of connection between the operation of the new rule and a relevant past event," as that language is used in Landgraf. See also id. at ___ n.29, 114 S.Ct. at 1502 n.29 ("[W]e do not restrict the presumption against statutory retroactivity to cases

involving 'vested rights'.... Nor do we suggest that concerns about retroactivity have no application to procedural rules."). Assuming the relevant past event is the commission of the original crime, there is no connection, in the Landgraf sense, between the certificate of appealability changes and the original crime. No §2254 applicant or §2255 movant could credibly argue that he would not have committed the crime if he had known it was going to be more difficult to appeal any denial of collateral relief after he was convicted and his conviction was affirmed on direct appeal. See Drinkard, 97 F.3d at 766 ("[Applicant] obviously cannot argue that he relied on the existence of federal do novo review of claims adjudicated on the merits in state court proceedings the night he killed his three victims.").

Assuming that the relevant past event is some point in the trial or in a prior proceeding attacking the judgment, the requisite connection i still missing. No §2254 applicant or §2255 movant could persuasively argue that during his trial or prior attacks on the judgment, he relied to his detriment upon the pre-amendment versions of §2253 versions of §2253 and Rule 22(b). Release from a conviction or sentence is better sooner rather than later, and acquittal at trial is better yet. It is unlikely that any applicant or movant would pull any punches at trial or in early attacks on the judgment based upon expectations about the prospects of success in later proceedings. See Lindh, 96 F.3d at 866-67.

For these reasons, we hold that the AEDPA's certificate of appealability provisions, §§102 and 103 of the Act, apply to pending §2254 cases, such as Bailey's, where no application for a certificate of probable cause to appeal was filed before the

effective date of the Act, and to pending §2255 cases, such as Hunter's, where no notice of appeal was filed before that effective date.[6]

III. THE AUTHORITY OF DISTRICT JUDGES TO ISSUE CERTIFICATES OF APPEALABILITY

[*8] We turn now to the issue which prompted us to grant hearing en banc: whether 28 U.S.C. §2253(c) and Federal Rule of Appellate Procedure 22(b), as amended by §§102 and 103 of the AEDPA, authorize district court judges to issue certificates of appealability, or instead vest that

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[6]We do not mean to imply that all of the AEDPA amendments to the collateral review statutes and rules may be applied to pending cases. Section 101 of the AEDPA amends 28 U.S.C. §2244(d) to require that any 28 U.S.C. §2254 application be filed within one year of the completion of the state court direct review process, subject to tolling for the period when a properly filed state collateral review proceeding is pending. The Second Circuit has held that application of that provision to bar a §2254 application filed before the AEDPA's effective date "would be entirely unfair and a severe instance of retroactivity." Reyes v. Keane, 90 F.3d at 865-66. As the Supreme Court instructed us in Landgraf, "courts should evaluate each provision of the Act in light of ordinary judicial principles concerning the application of new rules to pending cases and pre-enactment conduct." ___ U.S. at ___, 114 S.Ct. at 1505 (emphasis added).

authority exclusively in circuit judges and justices.

A. The Positions of the Parties

In the Bailey case, which involves 28 U.S.C. §2254 relief and state inmates, the parties have squared off in opposition over the question, with the State of Alabama vigorously contesting Bailey's position that district judges can issue certificates of appealability in §2255 motion proceedings. We do not rest our decision in even the Hunter case on the government's concession. There are two reasons we are unwilling to do so.

First, the issue of whether a district judge can certify appeals in §2255 cases is materially identical to the issue of whether district judges can do so in §2254 cases is materially identical to the issue of whether. See n.8, infra. If we were to decide the §2255 issue based upon the government's concession in the Hunter case, that would needlessly impede the State of Alabama's ability to have its arguments decided on the merits in the Bailey case.

Second, past experience has taught us that on occasion the government's position on criminal law issues is fluid. See, e.g., United States v. Oboh, 92 F.3d 1082, 1084 (11th Cir. 1996). When we questioned the Department of Justice attorney at oral argument, he was unable to say that the concession he and the United States Attorney had made to us in the Hunter case was authorized by the Attorney General or the Solicitor General. In fact, he warned us that he could not bind the Solicitor General, who had not yet taken a position on the issue. Although the Department of Justice attorney did describe the concession as

reflecting "the position of the United States nationwide," he also cautioned that the government reserved the right to change its mind at any time.

For these reasons, we prefer to decide the certificate of appealability issues in both of these cases based upon our evaluation of the merits rather than rely upon the government's concession in the Hunter case.

B. The Language of the Provisions as Amended

We begin where courts interpreting statutory and rule provisions should, with the language of the provisions. Section 102 of the AEDPA amended §2253, so that it now reads in pertinent part:

> (c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from --
>
> (A) the final order in a habeas corpus proceedings in which the detention complained of arises out of process issued by a State court; or
>
> (B) the final order in a proceeding under section 2255.
>
> (2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.
>
> (3) The certificate of appealability under paragraph (2) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

28 U.S.C. §2253(c). The crucial phrase is "circuit justice or judge." Unfortunately, that phrase is ambiguous, because the adjective "circuit" can be read in either of two ways. On the one hand, "circuit" can be read to modify both "justice" and "judge"; if that is what Congress meant, district court judges are not authorized to issue certificates of appealability, because a district judge is neither a "circuit justice" nor a "circuit judge."

The plain language of the statutory provision being interpreted is usually the best indication of legislative intent, but here the language is not plain. It is ambiguous. If all we had to consider was the language of §2253(c), as amended, we might be hard put to choose between the two plausible interpretations of the "circuit justice or judge" language. But, there is more.

The same subject is also addressed in §103 of the AEDPA, which amended Rule 22(b). As amended by §108, Rule 22(b) now provides:

> **(b) Certificate of appealability.** In a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court, an appeal by the applicant for the writ may not proceed unless a district or a circuit judge issues a certificate of appealability pursuant to section 2253(c) of title 28, United States Code. If an appeal is taken by the applicant, the district judge who rendered the judgment shall either issue a certificate of appealability or state the reasons why such a certificate should not issue. The certificate or the statement shall be forwarded to the court of appeals with the notice of appeal and the file of the proceedings in the district court. If the

> district judge has denied the certificate, the applicant for the writ may then request issuance of the certificate by a circuit judge. If such a request is addressed to the court of appeals, it shall be deemed addressed to the judges thereof and shall be considered by a circuit judge or judges as the court deems appropriate. If no express request for a certificate is filed, the notice of appeal shall be deemed to constitute a request addressed to the judges of the court of appeals. If an appeal is taken by a State or its representative, a certificate of appealability is not required.

Fed.R.Civ.P. 22(b). Plainly, the language of that provision authorizes district judges to issue certificates of appealability in §2254 cases.

The State of Alabama[7] attempts to escape the force of the plain language of Rule 22(b) by focusing on the "pursuant to §2253(c)" cross reference at the end of the first sentence of the rule. The State argues that when the rule says that "a district or a circuit judge issues a certificate of appealability pursuant to section 2253(c)," what it means is that a district judge cannot, because that is what §2253(c) really

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[7]As we did with Hunter and Bailey, see supra n. 2, for the sake of simplicity, we will attribute to the State of Alabama not only its own arguments, but also the arguments on the same issues made in the amici curiae briefs filed by the States of Florida and Georgia.

means. Those four words, "pursuant to section 2253(c)," at the end of one of Rule 22(b)'s seven sentences will not bear the weight the State would have us put on them. We do not believe that Congress intended the cross reference to §2253(c) to operate like a virus eating away the plain meaning of much of the language in the remainder of the rule, such as the very next sentence which says: "If an appeal is taken by the applicant, the district judge who rendered the judgement shall either issue a certificate of appealability or state the reasons why such a certificate should not issue." Instead, we think that when Congress said in Rule 22(b) that issuance of certificates of appealability should be "pursuant to" §2253(c), it was referring to the standard for issuing such certificates, which is prescribed in §2253(c)(2), and to the requirement that the particular issues meeting that standard be specified, which is contained in §2253(c)(3).

As far as Rule 22(b) is concerned, there is only one plausible interpretation of its language relating to the present issue. Not only does the rule make it clear that a district judge is authorized to issue a certificate of appealability, the plain language of the rule requires the judge whose denial of relief is subject to the attempted appeal either to issue a certificate, or to state why one should be denied. Only if the district judge who rendered the judgment has declined to issue the certificate does a circuit judge come into the picture. Under the plain language of the rule, an applicant for the writ gets two bites at the appeal certificate apple: one before the district

judge, and if that one is unsuccessful, he gets a second one before a circuit judge.[8]

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[8]Rule 22(b) addresses only "habeas proceeding[s] in which the detention complained of arises out of process issues by a state court"; it says nothing about §2255 federal prisoner proceedings. As a result, at least one court has concluded that although district courts have the authority to issue certificates of appealability §2254 proceedings, they lack that authority in §2255 proceedings. United States v. Cota-Loaiza, 936 F.Supp. 756, 760-61 (D.Colo.1996).

We disagree with the proposition that §2253(c)'s "circuit justice or judge" language means one thing for §2254 proceedings but something different for §2255 proceedings. It is a basic rule of statutory construction that "identical words [even when] used in different parts of the same act are intended to have the same meaning." Sullivan v. Stroop, 496 U.S. 478, 484, 110 S.Ct. 2499, 2504, 110 L.Ed.2d 438 (1990) (citations and internal quotation marks omitted); accord, e.g., C.I.R. v. Lundy, ___ U.S. ___, ___, 116 S.Ct. 647, 655, 133 L.Ed.2d 611 (1996) ("The interrelationship and close proximity of these provisions of the statute presents a classic case for application of the normal rule of statutory construction that identical words used in different parts of the same act are intended to have the same meaning.") (citations and internal quotation marks omitted); In re St. Laurent, 991 F.2d 672, 680 (11th Cir.1993) ("It is a basic

(Footnote Continued)

To sum up what we have on the face of the provisions, §102 of the AEDPA amended 28 U.S.C. §2253 so that it now contains language ("circuit justice or judge") that is ambiguous insofar as the issue at hand is concerned. Yet, in the very next section of the AEDPA Congress focused on Rule 22(b), modified it somewhat, and left the plain language of that rule susceptible to but one meaning insofar as the same issue is concerned.

We have a choice. On the one hand, we could interpret the ambiguous phrase "circuit justice or judge" in §2253(c) to mean "circuit justice of circuit judge," which will conflict with and render meaningless much of the plain language of Rule 22(b). Indeed, at least some of the language in each of the first four sentences of the rule would be negated by such an interpretation of §22539c). On the other hand, we could interpret the ambiguous phrase in §2253(c) to mean a "circuit justice" or a "judge," which would include district judges as well as

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canon of statutory construction that identical terms within an Act bear the same meaning"). It follows with even more force that a term used once within a single statutory provision should not be given two different meanings. Moreover, as our subsequent discussion of the legislative history of §2253 will make clear, there is no indication at all that Congress intended to distinguish between §2254 and §2255 proceedings relating to this issue; every indication is to the contrary.

circuit judges. That interpretation would reconcile the statutory provision with the rule and give effect to each word of both provisions. The right choice seems clear, at least insofar as common sense is concerned.

[9] In this instance, decisional law is consistent with the dictates of common sense. No canon of statutory construction is an infallible guide, but one of the most reliable is that the text of each provision of an act or statute should be read in a way that gives effect to all of its provisions. See, e.g., United States v. Nordic Village, Inc., 503 U.S. 30, 35-36, 112 S.Ct. 1011, 1015, 117 L.Ed.2d 181 (1992); Mountain States Telephone and Telegraph Co. v. Pueblo of Santa Ana, 472 U.S. 237, 249, 105 S.Ct. 2587, 2594, 86 L.Ed.2d 168 (1985). If we were to construe the phrase "circuit justice or judge" in §2253(c), as amended by §102 of the AEDPA, to exclude district judges, we would violate the Supreme Court's admonition that we not construe legislative enactments "so as to render superfluous other provisions in the same enactment," Freytag v. C.I.R., 501 U.S. 868, 877, 111 S.Ct. 2631, 2638, 115 L.Ed.2d 764 (1991), such as Rule 22(b), as amended by §103 of the AEDPA.[9]

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[9]In the alternative to its argument that district court judges are not authorized to issue certificates of appealability, the State of Alabama contends that before any appeal can proceed, two certificates of appealability are required, one from the district judge and another from a court of appeals judge. One district court has speculated, without much enthusiasm, that

(Footnote Continued)

As strongly as the reconciliation canon pushes us towards a decision, however, we do not end our inquiry with it. Before concluding this matter, we will address the State of Alabama's contention that the legislative history of the AEDPA amendments to §2253 and Rule 22(b) supports the State's interpretation of those provisions.

C. The Legislative History of the Amendments

The history of the effort to amend the appeal certificate provisions of §2253 and Rule 22(b) extends back a quarter of a century. Over the years Congress repeatedly considered proposals to remove from district judges the authority to issue certificates permitting collateral review appeals. While

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Congress contemplated such a scheme. See Houchin v. Zavaras, 924 F.Supp. 115, 117 (D.Colo.1996) ("Perhaps, two certificates are contemplated. In view of the apparent contradiction, however, it is unlikely that contemplation played any role at all.")

We reject the State's alternative argument about two certificates, however, because it is inconsistent with the plain language of §2253(c)(1) ("[U]nless a circuit justice or judge issues a certificate of appealability"), and with the plain language of Rule 22(b) as amended ("[A]n appeal by the applicant for the writ may not proceed unless a district or a circuit, the applicant for the writ may then request issuance of the certificate by a circuit judge.").

those proposals enjoyed considerable support, there was also opposition to them, and Congress ultimately chose to leave district judges with the authority to issue such certificates.

1. Judge Friendly's Proposal

The story begins, oddly enough, in a footnote of a law review article. The genesis was not in jury any law review article; it was in Judge Henry J. Friendly's famous, and famously influential, article Is Innocence Irrelevant?: Collateral Attack on Criminal Judgment, 38 U. Chi. L.Rev. 142 (1970). That article sounded a clarion call for collateral review reform which would echo in Supreme Court decisions for years to come. See, e.g., Schlup v. Delo, ___ U.S. ___, ___ & n. 46, 115 S.Ct. 851, 867 & n. 46, 130 L.Ed.2d 808 (1995); Teague v. Lane, 489 U.S. 288, 309, 109 S.Ct. 1060, 1074-75, 103 L.Ed.2d 334 (1989); Kuhlmann v. Wilson, 477 U.S. 436, 453-54 & nn. 16-17, 106 S.Ct. 2616, 2626-27 & nn. 16-17, 91 L.Ed.2d 434 (1986). The article's "chief concern is about the basic principle of collateral attack only when the prisoner supplements his constitutional plea with a colorable claim of innocence." 38 U. Chi. L.Rev. at 142, 146. However, the article also addresses some specific procedural matters, including the requirement of a certificate of probable cause to appeal the denial of collateral relief.

When Judge Friendly wrote the article in 1970 (and up until the AEDPA went into effect twenty-six years later), §2253 provided, in pertinent part:

> An appeal may not be taken to the court of appeals from the final order in a habeas corpus proceeding where the detention

complained of arises out of process issued by a State court, unless the justice or judge who rendered the order or a circuit justice or judge issues a certificate of probable cause.

28 U.S.C. §2253. That part of §2253 had remained unchanged since it was enacted in 1948. The complementary rule provision was Federal Rule of Appellate Procedure 22(b), which provided (as it would for the next twenty-six years):

> **(b) Necessity of Certificate of Probable Cause for Appeal.** In a habeas corpus proceeding in which the detention complained of arises out of process issued by a state court, an appeal by the applicant for the writ may not proceed unless a district or a circuit judge issues a certificate of probable cause. If an appeal is taken by the applicant, the district judge who rendered the judgment shall either issue a certificate of probable cause or state the reasons why such a certificate should not issue. The certificate or the statement shall be forwarded to the court of appeals with the notice of appeal and the file of the proceedings in the district court. If the district judge has denied the certificate, the applicant for the writ may then request issuance of the certificate by a circuit judge. If such a request is addressed to the court of appeals, it shall be deemed addressed to the judges thereof and shall be considered by a circuit judge or judges as the court deems appropriate. If no express request for a certificate is filed, the notice of appeal shall be deemed to constitute a request addressed to the judges of the court of appeals. If an appeal is taken by a state

> or its representative, a certificate of probable cause is not required.

Fed. R.App. P. 22(b) (1995).

Thus, the statutory and rule provisions required a certificate of probable cause to appeal as a prerequisite to any appeal by a state inmate from the denial of §2254 relief. Judge Friendly had no problem with that requirement. In fact, he thought the certificate prerequisite was such a good idea that he proposed it be extended to federal inmate appeals from the denial of §2255 relief, see 38 U. Chi. L.Rev. at 144 n. 9, as it finally would be by the AEDPA amendments to §2253.

What Judge Friendly found fault with was permitting district court judges to issue the required certificates, thereby forcing courts of appeals to hear and decide appeals that they themselves might never have authorized. See 38 U. Chi. L.Rev. at 144 n. 9 (referring to "cases where the district court has issued a certificate, and under Nowakowski v. Maroney, 586 [386] U.S. 542 [87 S.Ct. 1197, 18 L.Ed.2d 282] (1967), the court of appeals has been obliged to hear the appeal although although it believed the certificate was improvidently granted."). He thought that permitting district judges to force court of appeals judges to hear appeals from the denial of collateral review was inefficient, wasted judicial resources, and contributed to the increasing number of habeas appeals. 38 U. Chi. L.Rev. at 144 n. 9. For those reasons, Judge Friendly proposed that:

> Congress should move promptly to amend 28 U.S.C. §2253 (1964) so as to place the authority to issue certificates of probable cause solely in the courts of appeals and require similar authorization

for appeals by federal prisoners in cases under 28 U.S.C. 2255 (1964) and Fed.R.Crim.P. 35.

Id.

2. The Friendly Approach in Congress

The Friendly approach to certificates of probable cause to appeal made its first appearance in Congress in 1972. See S. 3833, 92d Cong., 2d Sess. (1972). At the suggestion of the Department of Justice, Senator Hruska included in his habeas corpus reform legislation a provision that would have amended the pertinent part of 28 U.S.C. §2253 to provide:

> An appeal may be taken to the court of appeals from the final order in a habeas corpus proceeding or a proceeding under section 2255 of this title only if the court of appeals issues a certificate of probable cause: Provided, however, That the certificate need not issue in order for a State or the Federal Government to appeal the final order.

S. 3833, 92d Cong., 2d Sess. (1972) (emphasis changed).[10] That legislative proposal did

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[10]Other collateral review reform bills were introduced in Congress prior to S. 3833, namely House Bill 13722 and House Bill 11441, but those bills did not contain any amendment to 28 U.S.C. §2253 or Rule 22(b). See H.R. 11441, 92d Cong., 1st Sess. (1971); H.R. 13722, 92d Cong., 2d Sess. (1972).

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not attempt to amend Rule 22(b). Bills containing the identical language were introduced the next year, as well. See S.567, 93d Cong., 1st Sess. (1973); H.R. 7580, 93d Cong., 1st Sess. (1973).

Except for bills introduced in the early 1970's, there were apparently no significant legislative developments relating to this specific issue until 1982. In that year, Senator Thurmond introduced a bill that, among other things, would have amended the third paragraph of 28 U.S.C. §2253, to provide:

> An appeal may not be taken to the court of appeals from the final order in a habeas corpus proceeding where the detention

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Attorney General Richard G. Kleindienst wrote a letter to the Chairman of the House Committee on the Judiciary suggesting a number of changes in those House bills. See 118 Cong. Rec. 24,937-41 (1972) (reprinting June 21, 1972 letter from Kleindienst to Emanuel Celler, Chairman, House Committee on the Judiciary). Some of the changes Kleindienst recommended concerned certificates of probable cause to appeal. Citing Judge Friendly's article, Kleindienst suggested: extending the certificate requirement did not apply to state and federal government parties, and limiting the authority to issue such certificates to the courts of appeal. Senator Hruska incorporated Kleindienst's recommendations into S.3833 and reprinted the Kleindienst letter as an explanation for the bill. See 118 Cong. Rec. at 24,937-41.

> complained of arises out of process issued by a state court, or from the final order in a proceeding under section 2255 of this title, unless a circuit justice or judge issues a certificate of probable cause.

S.2216, 97th Cong., 2d Sess. §3 (1982) (emphasis added). Senator Thurmond's bill, unlike the bill Senator Hruska had introduced in 1972, would also have amended Rule 22(b) to state:

> **(b) Necessity of Certificate of Probable Cause for Appeals.** In a habeas corpus proceeding in which the detention complained of arises out of process issued by a state court, and in a motion proceeding pursuant to 28 U.S.C. §2255, an appeal by the applicant or movant may not proceed unless a circuit judge issues a certificate of probable cause. If a request for a certificate of probable cause is addressed to the court appeals, it shall be deemed addressed to the judges thereof and shall be considered by a circuit judge or judges as the court deems appropriate. If no express request for a certificate is filed, the notice of appeal shall be deemed to constitute a request addressed to the judges of the court of appeals. If an appeal is taken by a state or the government or its representative, a certificate of probable cause is not required.

S. 2216, 97th Cong., 2d Sess. §4 (1982) (emphasis added).

Materially identical language amending both §2253 and Rule 22(b) was included in numerous collateral review bills considered

by Congress during the next dozen years.[11]

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[11]All of those bills used the phrase "circuit justice or judge" in proposed amendments to §2253 and the phrase "circuit judge" in proposed amendments to Rule 22(b). See H.R. 6050, 97th Cong., 2d Sess. §§3-4 (1982); S.2838, 97th Cong., 2d Sess. §§3-4 (1982); S.217, 98th Cong., 1st Sess. §§3-4 (1983); H.R. 2238, 98th Cong., 1st Sess. §§3-4 (1983); S.1753, 98th Cong., 1st Sess. §§3-4 (1983); S.238, 99th Cong., 1st Sess. §§3-4 (1985); S.2301, 99th Cong., 1 Sess. §§3-4 (1986); H.R. 73, 100th Cong., 1 Sess. §§3-4 (1987); S.260, 100th cong., 1st Sess. §§3-4 (1987); S.1285, 100th Cong., 1st Sess. §§3-4 (1987); S.1970, 100th Cong., 1st Sess. §§203-204 (1987); S.88, 101st Cong., 1st Sess. §§3-4 (1989); S.271, 101st Cong., 1st Sess. §§3-4 (1989); S.1225, 101st Cong., 1st Sess. §§603-604 (1989); H.R. 1090, 101st Cong., 1st Sess. §§3-4 (1989); H.R. 2709, 101st Cong., 1st Sess. §§603-604 (1989); H.R. 3119, 101st Cong., 1st Sess. §§402-403 (1989); H.R. 3918, 101st Cong., 2d Sess. §§203-204 (1990); H.R. 4079, 101st Cong., 2d Sess. §152 (1990); S.1241, 102d Cong., 1st Sess. §§1103-1104 (1991); S.1335, 102d Cong., 1st Sess. §902 (1991); S.2305, 102d Cong., 2d Sess. §§203-204 (1992); S.8, 103d Cong., 1st Sess. §§203-204 (1993); S.38, 103d Cong., 1st Sess. §§3-4 (1993); S.1356, 103d Cong., 1st Sess. §§703-704 (1993); H.R. 2217, 103d Cong., 1st Sess. §§203-204 (1993); H.R. 2321, 103d Cong., 1st Sess. §§203-204 (1993); H.R. 2847, 103d Cong., 1st Sess. §§203-204 (1993); H.R. 2872, 103d Cong., 1st Sess. §§802-803 (1993); H.R.

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There was never any doubt that the purpose of that language was, and its effect clearly would be, to implement the Friendly approach, removing from district judges the authority to issue certificates of probable cause to appeal. See e.g., The Habeas Corpus Reform Act of 1982: Hearing on S. 2216 Before the Senate Comm. On the Judiciary, 97th Cong., 2d Sess. 20 (1982) (statement of Jonathan C. Rose, Assistant Attorney General, Office of Legal Policy, U.S. Department of Justice); id. at 47 (letter of Attorney General William French Smith to Vice President Bush, introduced through Jonathan Rose); id. at 82-85 (section-by-section analysis of the bill by Jonathan Rose); 128 Cong. Rec. 21, 162 (1982) (statement of Senator Thurmond); S.Rep.No. 226, 98th Cong., 1st Sess. 18 (1983); Habeas Corpus Reform: Hearing on S.238 Before the Senate Comm. on the Judiciary, 99th Cong., 1st Sess. 35 (1985) (statement of Stephen S. Trott, Assistant Attorney General, Criminal Division); 133 Cong. Rec. 36,221 (1987) (statement of Senator Thurmond accompanying introduction of S.1970, 100th Cong., 1st Sess. 1987)).

The sheer number of bills introduced during this period that would have implemented the Friendly approach, see supra, n. 11, evidences the persistent support that approach enjoyed. One of its principal

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4055, 103d Cong., 2d Sess. §§802-803 (1994); H.R. 4079, 103d Cong., 2e Sess. §§102-103 (1994); H.R. 4197, 103d Cong., 2d Sess. §§802-803 (1994); H.R. 4848, 103d cong., 2d Sess. §§402-403 (1994); H.R. 5134, 103d Cong., 2d Sess. §§103-104 (1994).

supporters was the Department of Justice. In 1988, a Justice Department official told a House committee that:

> A fifth reform proposed in the legislation would vest the authority to issue certificates of probable cause for appeal in habeas corpus proceedings exclusively in the judges of the courts of appeals. This would correct inefficient and wasteful features of current procedure under which a petitioner is given repetitive opportunities to attempt to persuade first a district judge and then a circuit judge to authorize an appeal, and under which a court of appeals is required to hear an appeal on a district judge's certification, though it believes that the certificate was improvidently granted.

Hearing Before a Subcomm. of the House Comm. on Government Operations, 100th Cong., 2d Sess. 43 (1988) (statement of Paul Cassell, Associate Deputy Attorney General, regarding S.1970).

However, the Friendly approach did not meet with unanimous approval. In 1982, Professor Stephen Gillers of New York University School of Law urged the Senate Judiciary Committee to reject it:

> [L]et me say something about the proposal that only a circuit judge be empowered to issue a certificate of probable cause. Now, either the district judge who denied the petition or a circuit judge may issue one. The reason for the current rule is plain. The district judge is most familiar with the merits of the case and therefore is in the best position to say whether an appeal is in order. The circuit judge to whom the petition for a certificate of probable cause comes must

first familiarize himself with the case before deciding whether to issue such a certificate. In other words, much of the work the judge may ultimately have to do on the merits will have to be done in deciding whether a certificate should issue. This argument might lead to the conclusion that only district judges, already familiar with the case, be authorized to issue such certificates. The problem with that, however, is that it gives the district judge the power to block review of his own decision simply by denying a certificate. I recognize Judge Friendly's earlier criticism, but I have not been persuaded by it. Nor have I seen data which would suggest that the current regime has resulted in abuses.

The Habeas reform Act of 1982: Hearing on S.2216, 97th Cong., 2d Sess. 146.

Professor Gillers was not the only one who was unfriendly to the Friendly approach. A representative of the National Legal Aid and Defendant Association, the Legal Aid Society of New York City, and the Federal Defenders also submitted a statement at the same hearing, in which she described the benefits of allowing district judges to retain the authority they had to issue certificates of probable cause:

> Current district court certification process provides an opportunity for the district court to advise the court of appeals that while it believes the decision denying the writ to be correct, the case presents an important issue for review. The process takes little time, because the judge is aware of the claims involved and can decide whether to grant the certificate with no additional effort. On the other hand, an application

> for a certificate to the court of appeals generally requires an extended motion and memorandum of law. Usually, because there is no counsel appointed at the district court level, the motion is submitted pro se and a consideration by the court of appeals of the motion requires extended examination of the case. If a certificate is granted, the court reviews the case two times.

Id. at 209-210 (statement of Phylis Bamberger).

Three years later, when the Senate Judiciary Committee was again considering a bill that included the Friendly approach, that same witness spoke on behalf of the American Bar Association, against changing the law. Habeas Corpus Reform; Hearing on S. 238, at 109 statement of Phylis Bamberger). She argued that instead of saving time and resources, the Friendly approach would actually waste them, because appeals court judges would lack the familiarity with the case of the district judge who handled it. Id.

Larry Yackle, professor of Law at Boston University, speaking to the same Senate Committee on behalf of the American Civil Liberties Union, also opposed the Friendly approach. Id. at 133. he argued that, although a district judge's denial of a certificate to appeal should be reviewed by the court of appeals, "[i]f any judge can make a reliable determination regarding the arguable merit of an appeal, it is ... the judge who considered the claim at the trial level." Id. The ACLU's position was that "district judges are in an excellent position to identify arguable claims," and "we see nothing to be gained and much to be lost by

denying to district judges the authority to make determinations in any case." Id.

3. The Issue Resolved

The long-debated issue of whether district judges should continue to have the authority to issue appeal certificates was finally resolved by the 104th Congress. That Congress had before it bills containing provisions which clearly would have implemented the Friendly approach. Like similar bills from the 1980's, those 1995 bills would have not merely inserted the ambiguous "circuit justice or judge" language into §2253, they also would have amended Rule 22(b) to provide that "an appeal by the applicant or movant may not proceed unless a circuit judge issues a certificate of probable cause." See e.g., H.R. 3, 104th Cong. 1st Sess. §§102-103 (1995); H.R. 729, 104th Cong., 1st Sess. §§102-103 (1995); H.R. 920, 104th Cong., 1st Sess. §§ 502-503 (1995); H.R. 2992, 104th Cong., 2d Sess. §§502-503 (1996).[12] It was the language amending Rule 22(b) that left no doubt district judges would be precluded from issuing appeal certificates, if any of these bills were enacted.

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[12]Senate Bill 3 took a somewhat different approach toward the same end. It would have amended Rule 22(b) to provide that an appeal could not proceed unless "the Court of Appeals' (not just a circuit judge) issues a certificate of probable cause to appeal. See S.3, 104th Cong., 1st Sess. §508 (1995).

However, Congress also had before it several bills that did not incorporate Judge Friendly's proposal, and it was one of those bills that Congress ultimately chose to enact. The first bill in the 104th Congress that deviated from the Friendly approach was Senate Bill 623, sponsored by Senator Specter. That bill differed from its predecessors in several ways that are relevant to our discussion. It was the first bill to replace the term "certificate of probable cause: with "certificate of appealability," a change reflected in both the proposed amendment to §2253 and the proposed amendment to §2253 and the proposed amendment to Rule 22(b). S.623, 104th Cong., 1st Sess. §§3-4 (1995).

Like many other bills, S.623 would have amended §2253 to provide that a "circuit justice or judge" could issue a certificate of appealability. Id. §3. What was different about the relevant part of S.623 is what it proposed to do with Rule 22(b). It would have inserted the new "certificate of appealability" terminology and a "pursuant to section 2253(c)" cross-reference into Rule 22(b), but those changes were relatively minor. Id. §4. The important difference between S623 and competing bills is that S.623 would not have rewritten Rule 22(b) to provide that only court of appeals judges could issue the necessary certificates. Instead, this bill would have left intact the language of Rule 22(b) that expressly permitted either "a district judge or a circuit judge" to issue the certificates, and that required a district judge who denied relief to "either issue a certificate of appealability or state the reasons why such a certificate should not issue." Id. §4. Thus, S. 623 reflected an understanding that the phrase "circuit justice or judge" in §2253(c) could embrace "a district or a

circuit judge" as that language is used in Rule 22(b).

Hearings on S.623, which was entitled the "Habeas Corpus Reform Act of 1995," and related crime bills were held before the Senate Judiciary Committee. California Attorney General Daniel Lungren submitted a statement addressing several issues related to collateral review reform, and in that statement mentioned that the House had passed H.R. 729. Concerning Habeas Corpus Reform: Hearings on H.R. 729, S.623, and S.3 Before the Comm. of the Judiciary, United States Senate, 141st Cong., 1st Sess. (1995) (statement of Daniel Lungren, Attorney General, California). House Bill 729 would have implemented the Friendly approach to appeal certificates. Though Lungren supported many of the provisions in H.R. 729, he recommended that Congress continue to allow district judges to issue certificates of probable cause:

> Congress adopted the certificate of probable cause requirement in 1908 to curb the practice of frivolous habeas appeals for delay purposes. The United States Supreme Court in Barefoot v. Estelle has also noted that a certificate of probable cause requires a proper showing. Specifically, the certificate should not issue unless the petitioner makes "a substantial showing of the denial of [a] federal right." I strongly support language in the Habeas Corpus Reform Act which provides that the granting of a certificate of probable cause is to be done on an issue by issue basis.
>
> Finally, the U.S. Supreme Court has noted that "it is established law that a circuit judge or justice entertaining an application for a certificate should give

> weighty consideration to its prior denial by a district judge." In this regard, I would recommend preserving existing law with respect to the ability of a federal district court judge or a circuit court judge to issue certificates of probable cause.

Id. (emphasis added; footnotes to citations deleted). Lungren's position on the issue is noteworthy for two reasons: he was the Attorney General of California and one of the most active proponents of change in the law governing collateral review; and while he had been a member of Congress, Lungren had introduced proposed legislation that incorporated the Friendly approach. See H.R. 6050, 97th Cong., 2d Sess. §§3-4 (1982); H.R. 2238, 98th Cong., 1st Sess. §§3-4 (1983). In spite of his previous support of the Friendly approach, by 1995 Lungren had come to believe that district judges should retain the authority to issue certificates of probable cause, and he expressed that opinion to the Senate Judiciary Committee. Concerning Habeas Corpus Reform (statement of Daniel Lungren).

At least five bills in the 104th Congress in addition to S. 623 used the "circuit justice or judge" language in proposed amendments to 28 U.S.C. §2253, while at the same time leaving intact the language in Rule 22(b) that clearly provided district judges with authority to issue certificates of appealability. See S. 735, 104th Cong., 1st Sess. §§702-703 (1995); S. 816, 104th Cong., 1st Sess. §§902-903 (1995); H.R. 2586, 104th Cong., 1st Sess. §§102-103 (1995); H.R. 2703, 104th Cong., 1st Sess., §§902-903 (1995); H.R. 2768, 104th Cong., 1st Sess. §§902-903 (1995).

The most important of those other bills was Senator Dole's Senate Bill 735, because it would ultimately be enacted into law. That bill would amend the third paragraph of §2253 to provide:

> (c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from --
>
> (A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or
>
> (B) the final order in a proceeding under section 2255.
>
> (2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.
>
> (3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

S.735 §702.[13] Senate Bill 735 would also

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[13]The amendments reflected in §2253(c)(2) and (3), which do not directly relate to the issue before us, had been included in a number of other bills considered by the 104th Congress, including §623. See S.623, 104th Cong., 1st Sess. §3 (1995); see also e.g., S.3, 104th Cong., 1st Sess. §508 (1995).

retain in an amended Rule 22(b) the language providing either a "district or a circuit judge" could issue the certificate, and requiring a district judge who denied relief to either issue a certificate or explain why. Id. §703.

The Senate passed S.735. The House did too, but only after substituting the text of H.R. 2703 in toto. That substitution is not material for our purposes, because H.R. 2703 contained provisions relating to certificates of appealability that were identical in all respects to those in S.735. Compare S.735 §§702-703 with H.R. 2703 §§902-903. Some of the other provisions in the two bills were different, however, so there was a Conference Committee. The Conference Committee. The Conference Committee Report resolved the other differences between the House and Senate.[14] The Conference Committee's recommendations were agreed to by each body, and the AEDPA was signed into law on April 24, 1996. As enacted and signed into law on April 24, 1996. As enacted and signed into law, the legislation contained the amendments to §2253 and Rule 22(b) exactly as they had been in proposed in S.623 and S.735. See AEDPA §§102-103.

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[14]Under the heading "Title I--Habeas Corpus Reform," the Conference Committee Report discusses the purpose and the effect of the Act's provisions relating to collateral review proceedings. See H.R. Conf. Rep. No. 518, 104th Cong., 2d Sess. 111 (1996). The certificate of appealability provisions are not mentioned in the report.

4. What the Legislative History Means

Our review of the legislative history shows that Congress considered, off and on for a quarter of a century, the question of whether district judges should retain the authority to issue certificates allowing appeals from the denial of collateral review. The Friendly which would have changed the law to divest district judges of that authority, drew opposition as well as support over the years.

The 104th Congress, which finally resolved the matter, was presented with a choice. Virtually all of the bills that addressed the matter would have amended §2253 to include the "circuit justice or judge" language. That was not the choice. The choice was what to do with Rule 22(b). What Congress chose to do about that rule would give meaning to the "circuit justice or judge" language in §2253. One group of bills unquestionably would have adopted the Friendly approach by amending Rule 22(b) to expressly provide provide that only a circuit judge could issue the certificates necessary for an appeal. Another group of bills would have amended Rule 22(b) in minor ways, such as substituting "certificate of appealability" for "certificate of probable cause," but would have left intact the language of that rule which clearly authorizes the district judges to issue such certificates. That language provides that "a district judge or a circuit judge" may issue the certificate, and imposes on a district judge who denies collateral relief the duty to "either issue a certificate of appealability or state the reasons why such a certificate should not issue." Congress made its choice, and that choice was to adopt the second option, not the Friendly approach.

The legislative history leading up to enactment of the AEDPA §§102-103 amendments to 28 U.S.C. §2253 and to Federal Rule of Appellate Procedure 22(b) does not convince us that Congress intended to divest district judges of the authority to issue certificates of appealability. To the contrary, the legislative history of the amendments indicates otherwise. It certainly does not override the force of the decisional law requiring that we give all the language of both §2253(c) and Rule 22(b), as amended, effect. See supra p. 1576.

IV. CONCLUSION

We hold that the 28 U.S.C. §2253(c) and Federal Rule of Appellate Procedure 22(b) amendments, made by §§102-103 of the Antiterrorism and Effective Death Penalty Act of 1996, apply 28 U.S.C. §2254 proceedings in which no certificate of probable cause to appeal was obtained before the April 24, 1996 effective date of the Act. We also hold that those amendments apply to 28 U.S.C. §2255 proceedings in which no notice of appeal was filed before that effective date.

We further hold that under 28 U.S.C. §2253(c), as amended, and Federal Rule of Appellate Procedure 22(b), as amended, district court judges are authorized to issue certificates of appealability.

In Hunter v. United States, No. 96-6513, we order that the appeal may proceed.

In Bailey v. Nagle, No. 96-6770, we remand the case to the district court for compliance with the requirement of 28 U.S.C. §2253(c)(3) that the certificate of appealability indicate which specific issue or issues satisfies the §2253(c)(2) standard. After such compliance, the appeal may proceed.

So ORDERED.

APPENDIX B

IN THE DISTRICT COURT
OF THE UNITED STATES FOR THE
MIDDLE DISTRICT OF ALABAMA,
NORTHERN DIVISION

HENRY C. BAILEY,	)	
	)	
Petitioner,	)	
	)	
v.	)	CIVIL ACTION NO.
	)	95-T-262-N
JOHN E. NAGLE, Warden, et al.,	)	
	)	
	)	
Respondents.	)	

ORDER

Upon consideration of the motion for certificate or probable cause filed by petitioner on July 29, 1996, it is ORDERED that the motion is treated as a motion for certificate of appealability and said motion is granted.

In April of 1996, 28 U.S.C.A. § 2253 was amended to provide that a "certificate of appealability" rather than a 'certificate of probable cause" is necessary before a petitioner may pursue an appeal in a habeas corpus proceeding. To obtain a certificate of appealability the prisoner must make a "substantial showing of the denial of a constitutional right." 28 U.S.C.A. § 2253(c)(2).[15] The court finds that the

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[15]The standard for a certificate of probable cause is that the petitioner must "make a 'substantial showing of the denial

(Footnote Continued)

petitioner has made a "substantial showing of the denial of a constitutional right." 28 U.S.C.A. § 2253 (c)(2).

The petitioner is, however, notified that there is an unsettled question of law concerning the issue of whether a district judge may grant or deny a request for a certificate of appealability. Under the provisions of 28 U.S.C.A. § 2253(c)(1), as recently amended, only a "circuit justice or judge" may issue a certificate of appealability. However, under Rule 22 of the Federal Rules of Appellate Procedure, as recently amended, a "district or a circuit judge" may issue a certificate of appealability. Consequently, even though this court is granting the petitioner's request for a certificate of appealability,

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(Footnote Continued)
of [a] federal right.'" Barefoot v. Estelle, 463 U.S. 880, 893, 103 S.Ct. 3383, 3394 (1983) (quoting Stewart v. Beto, 454 F.2d 268, 270 n.2 (5th Cir. 1971), cert. denied, 406 U.S. 925, 92 S.Ct. 1796 (1972)). The Supreme Court further explained that "'in requiring a "question of some substance," or a "substantial showing of the denial of [a] federal right," obviously the petitioner need not show that he should prevail on the merits. He has already failed in that endeavor. Rather, he must demonstrate that the issues are debatable among jurists of reason; that a court could resolve the issues [in a different manner]; or that the questions are "adequate to deserve encouragement to proceed further.'" Id. at 893 n.4, 103 S.Ct. at 3394 n.4 (quoting Gordon v. Willis, 516 F. Supp. 911, 913 (N.D. Ga. 1980)).

the petitioner may still be required to request a certificate from the United States Court of Appeals for the Eleventh Circuit.

DONE, this the 21st day of August, 1996.

/s/ Myron Thompson
UNITED STATES DISTRICT JUDGE

APPENDIX C

Public Law 104-132
104th Congress
S. 735

AN ACT

To deter terrorism, provide justice for victims, provide for an effective death penalty, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Antiterrorism and Effective Death Penalty Act of 1996."

SEC. 2. TABLE OF CONTENTS.

The table of contents of this Act is as follows:

(OMITTED)

TITLE I - HABEAS CORPUS REFORM

SEC. 101. FILING DEADLINES.

Section 2244 of title 28, United States Code, is amended by adding at the end the following new subsection:

"(d)(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of--

"(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

"(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

"(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right retroactively applicable to cases on collateral review; or

"(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

"(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.".

SEC. 102. APPEAL

Section 2253 of title 28, United States Code, is amended to read as follows:

"§2253. Appeal

"(a) In a habeas corpus proceeding or a proceeding under section 2255 before a district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held.

"(b) There shall be no right of appeal from a final order in a proceeding to test the validity of a warrant to remove to another district or place for commitment or trial a person charged with a criminal offense against the United States, or to test the validity of such person's detention pending removal proceedings.

"(c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from--

"(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or

"(B) the final order in a proceeding under section 2255.

"(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

"(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).".

SEC. 103. AMENDMENT OF FEDERAL RULES OF APPELLATE PROCEDURE.

Rule 22 of the Federal Rules of Appellate Procedure is amended to read as follows:

"Rule 22. Habeas corpus and section 2255 proceedings

"(a) APPLICATION FOR THE ORIGINAL WRIT.--An application for a writ of habeas corpus shall be made to the appropriate district court. If application is made to a circuit judge, the application shall be transferred to the appropriate district court. If an application is made to or transferred to the district court and denied, renewal of the application before a circuit judge shall not be permitted. The applicant may, pursuant to section 2253 of title 28, United States Code, appeal to the appropriate court of appeals from the order of the district court denying the writ.

"(b) CERTIFICATE OF APPEALABILITY.--In a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court, an appeal by the applicant for the writ may not proceed unless a district or a circuit judge issues a certificate of appealability pursuant to section 2253(c) of title 28, United States Code. If an appeal is taken by the applicant, the district judge who rendered the judgment shall either issue a certificate of appealability or state the reasons why such a certificate should not issue. The certificate or the statement shall be forwarded to the court of appeals with the notice of appeal and the file of the proceedings in the district court. If the district judge has denied the certificate, the applicant for the writ may then request issuance of the certificate by a circuit judge. If such a request is addressed to the court of appeals, it shall be deemed addressed to the judges thereof and shall be considered by a circuit judge or judges as the court deems appropriate. If no express request for a certificate is filed, the

notice of appeal shall be deemed to constitute a request addressed to the judges of the court of appeals. If an appeal is taken by a State or its representative, a certificate of appealability is not required.".

SEC. 104. SECTION 2254 AMENDMENTS.

Section 2254 of title 28, United States Code, is amended--

(1) by amending subsection (b) to read as follows:

"(b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that--

"(A) the applicant has exhausted the remedies available in the courts of the State; or

"(B)(i) there is an absence of available State corrective process; or

"(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

"(2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the court of the State.

"(3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.";

(2) by redesignating subsections (d), (e), and (f) as subsections (e), (f), and (g), respectively;

(3) by inserting after subsection (c) the following new subsection:

"(d) An application a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim--

"(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

"(2) resulted in a decision that was based on an unreasonable determination oft he facts in light of the evidence presented in the State court proceeding";

(4) by amending subsection (e), as designated by paragraph (2), to read as follows:

"(e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

"(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold that an evidentiary hearing on the claim unless the applicant shows--

"(A) the claim relies on--

"(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

"(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

"(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense."; and

(5) by adding at the end the following new subsections:

"(h) Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel for an applicant who is or becomes financially unable to afford counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

"(i) The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254."

SEC. 105. SECTION 2255 AMENDMENTS.

Section 2255 of title 28, United States Code, is amended--

(1) by striking the second and fifth undesignated paragraphs; and

(2) by adding at the end the following new undesignated paragraphs:

"A,1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of--

"(1) the date on which the judgment of conviction becomes final;

"(2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;

"(3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

"(4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

"Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment

of counsel under this section shall be governed by section 3006A of title 18.

"A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain--

"(1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or

"(2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.".

SEC. 106. LIMITS ON SECOND OR SUCCESSIVE APPLICATIONS.

(a) CONFORMING AMENDMENT TO SECTION 2244(a).--Section 2244(a) of title 28, United States Code, is amended by striking "and the petition" and all that follows through "by such inquiry." and inserting ",except as provided in section 2255.".

(b) LIMITS ON SECOND OR SUCCESSIVE APPLICATIONS. --Section 2244(b) of title 28, United States Code, is amended to read as follows:

"(b)(1) A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.

"(2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless--

"(A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

"(B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence: and

"(ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

"(3)(A) Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.

"(B) A motion in the court of appeals for an order authorizing the district court to consider a second or successive application shall be determined by a three-judge panel of the court of appeals.

"(C) The court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies the requirements of this subsection.

"(D) The court of appeals shall grant or deny the authorization to file a second or

successive application not later than 30 days after the filing of the motion.

"(E) The grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari.

"(4) A district court shall dismiss any claim presented in a second or successive application that the court of appeals has authorized to be filed unless the applicant shows that the claim satisfies the requirements of this section."

SEC. 107. DEATH PENALTY LITIGATION PROCEDURES.

(OMITTED)

TITLE II - JUSTICE FOR VICTIMS

(OMITTED)

TITLE III - INTERNATIONAL TERRORISM PROHIBITIONS

(OMITTED)

TITLE IV - TERRORIST AND CRIMINAL ALIEN REMOVAL AND EXCLUSION

(OMITTED)

TITLE V - ALIEN TERRORIST REMOVAL PROCEDURES

(OMITTED)

TITLE V - NUCLEAR, BIOLOGICAL, AND CHEMICAL WEAPONS RESTRICTIONS

(OMITTED)

TITLE VII - CRIMINAL LAW MODIFICATIONS TO COUNTER TERRORISM

(OMITTED)

TITLE VIII - ASSISTANCE TO LAW ENFORCEMENT

(OMITTED)

TITLE IX - MISCELLANEOUS

(OMITTED)